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IN THE

Supreme Court of the United States

October Term, 1964

Number 178

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,

Appellant,

vs.

JAMES W. DORSEY, DAN I. MacINTYRE, III, and JAMES EDWARD MANGET,

Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

BRIEF FOR THE APPELLEES

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Cases Cited

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINION BELOW

The Appellant has correctly cited the opinion below and Appellees will not re-cite that opinion.

JURISDICTION

The Appellant's statement of jurisdiction, including the citations of statutory and case law, is correct and Appellees adopt Appellant's statement of jurisdiction.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Appellant has correctly stated and cited the statutory and constitutional provisions involved in the case before the Court and Appellees will therefore make no restatement of the statutory and constitutional provisions involved.

QUESTIONS PRESENTED

Appellant has correctly stated the questions presented for decision by this Court and Appellees adopt Appellant's statement.

STATEMENT OF CASE

This is a direct appeal from the final judgment and decree entered on April 6, 1964 by a three judge panel convened in the United States District Court for the Northern Judicial District of Georgia to hear this case pursuant to 28 USC §2281. The Court below granted Appellees' Motion for Summary Judgment and declared that portion of Section 9 of the Senate Reapportionment Act of the General Assembly of the State of Georgia, approved on October 5, 1962,[1] which reads "except that the Senators from those Senatorial Districts consisting of less than one county shall be elected

[1] Georgia Laws, September-October, 1962, Extra. Sess. Page 7, at Page 30; Georgia Code Annotated, §47-102.

by all of the voters of the county in which such Senatorial District is located" to be unconstitutional, null and void because it violates the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States.

The effect of that decree was to find that every senator elected to the State Senate of the State of Georgia must be elected by the voters of his own district, without regard to whether said senator represents a senatorial district comprising an entire county or more than one county or less than one county.

The original complaint was filed in the United States District Court by three registered voters, two of whom resided in the 40th Senatorial District, which is a part of Fulton County, Georgia, and one of whom resided in the 42nd Senatorial District, which is a part of DeKalb County, Georgia. One of the plaintiffs was also the elected State Senator from the 40th Senatorial District of the State of Georgia. The complaint named as defendants the Secretary of State of Georgia and the Ordinaries of Fulton and DeKalb Counties, who are the chief election officials of their respective counties. The complaint alleged that the seven most populous counties of the State of Georgia contained more than one senatorial district and the remainder of Georgia's 159 counties either made up a single senatorial district or several counties taken together comprised a single senatorial district. The Appellees sought to invalidate that part of the statute which is above quoted that required that State Senators from those senatorial districts consisting of less than one county had to be elected by all of the voters of the county in which such senatorial district was located.

Appellant admitted all of Appellees' allegations of fact in the Court below and the case was submitted to the District Court solely on a question of law raised by the Motion for Summary Judgment of Appellant and Cross-Motion for Summary Judgment of Appellees.

ARGUMENT

While the case law involved in issue before the Court is relatively new, far reaching in scope, and well known to this Court, a brief review of the precedents will serve to establish the foundation of the Appellees' position.

Baker v. Carr, 369 US 186, was an action filed in the United States District Court in Tennessee under 42 USC §§1983 and 1988, by qualified voters seeking to redress deprivation of their rights under the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States. The plaintiffs in that action specifically attacked a statute of the State of Tennessee on the grounds that it arbitrarily and capriciously apportioned seats in the Tennessee General Assembly and by virtue of a failure on the part of the Tennessee State Legislature to reapportion itself, the plaintiffs' votes were debased and they were thereby denied equal protection of the laws.

The action now before the Court is similar in that it is an action in a United States District Court, also filed under 42 USC §§1983 and 1988, by qualified voters of the State of Georgia who seek to redress rights deprived them by a statute of the State of Georgia denying them equal protection of the laws within the meaning of the Fourteenth Amendment by diluting or debasing their voting power. *Baker v. Carr*, supra, laid to rest the

questions of jurisdiction of the subject matter, standing to maintain such a suit, and the justiciability of the cause of action.

The rationale of the District Court decision was that "the essence of a representative government is the choosing of a representative by those he represents." This same reasoning underlies the same District Court's decision in *Toombs v. Fortson*, (D.C. Ga. 1962) 205 F. Supp. 248. Appellees respectfully submit that this rationale is plainly correct and it therefore follows that any system of electing one's representatives other than by those he represents lacks "the essence of representation" heretofore twice noted by the District Court below and demanded by the decisions of this Court.

In the case before this Court, the undisputed facts are that there are seven senatorial districts within Fulton County, Georgia. They are:

District 34 containing 82,195 voters
District 35 containing 82,888 voters
District 36 containing 79,023 voters
District 37 containing 78,540 voters
District 38 containing 78,953 voters
District 39 containing 79,713 voters
District 40 containing 74,834 voters

Three senatorial districts lie within DeKalb County, Georgia. They are:

District 41 containing 75,117 voters
District 42 containing 95,032 voters
District 43 containing 86,633 voters

From a mathematical standpoint, it is clear that even if every voter in Senatorial District 34 voted for the same candidate to represent that District, only eighteen (18%) percent of the voters in the other six districts

within Fulton County could nullify the unanimous choice of District 34 voters and thrust upon them a representative for that district for whom no one at all within that district had voted. This is an extreme example; however, it is far more likely that the most popular candidate imaginable in District 34 would receive the votes of 60% to 66% of the voters of the district. In this situation, only 11% of the voters of the other six Fulton County Districts could nullify the representative chosen by the vast majority of the voters in District 34. Such a result amounts to invidious discrimination against the voters in any senatorial district of the State of Georgia which is comprised of less than an entire county, because in any such district the representative chosen by the voters of that district may be defeated by the voters of foreign districts. In *Drew and Sideman v. Scranton* and *Johnson v. Bloom*, (M. D. Pa. 1964) 229 F. Supp. 310, the Federal District Court in Pennsylvania held that the use of multi member districts along with single member districts violate the principle of "one man—one vote." "One man—one vote" means, the Court said, that each voter must vote for the same number of legislators, otherwise some voters would have only one legislator looking out for their interests; others would have two, three or four although, of course, their districts might be two, three or four times larger. The Court added that "minority groups living in particular localities may well be submerged in elections at large but can often make their voting power much more effective in smaller single member districts in which they may live." This same rationale could work to deny proportionate representation or any representation at all to a minority political party which also might well be submerged in elections at large but could

use its voting power effectively in smaller single member districts. The fundamental issue in either the case of minority groups or minority political parties should be to achieve at least some representation of the minority's viewpoint in the legislative body of the State.

In *Wesberry v. Sanders*, 376 US 1, this Court said:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

The Court was following its previous thinking in *Gray v. Sanders*, 372 US 368, where Justice Douglas said at page 379:

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, wherever their home may be in the geographical unit. This is required by the equal protection clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters, but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates underlies many of our decisions."

Is not the purpose of county wide voting in the urban areas to dilute the strength and representation of minority, racial, religious, ethnic and political groups, im-

pacted within a small geographical area of the county? We submit that this is the purpose. Is this not another invidious scheme to obtain the end result exemplified by the term "gerrymandering"? The effect here is far worse on a minority group than a simple scheme of gerrymander.

The majority of the voters in the Georgia Senatorial Districts where the district is comprised of an entire county or more than one county get an entire vote for their representative and, therefore, directly participate in his election. The majority of the voters within a given district in multi district counties are not able to elect their popular choice to represent them. The voters in multi district Georgia counties are denied equal protection of the laws by virtue of the fact that their vote for their popular choice can be frustrated by a small percentage of voters who vote from foreign districts within the same county.

The Georgia statute which has been declared unconstitutional by the Court below, causes a clear difference in the treatment to be accorded to voters in each of the two classes of senatorial districts created by the statute. The statute is applied differently to different persons, depending upon where they reside. The voters in one class of districts select their own senators, but in the other they do not. They must join with others in selecting a group of representatives and their own choice of representation may be nullified by what voters in other districts of the county group desire. This difference amounts to a discrimination between the two classes of voters and this discrimination is such that is prohibited by the Fourteenth Amendment. In *Gray v. Sanders*, this Court held that under the Equal Protection clause of

the Fourteenth Amendment there is no indication that home site "afforded a permissible basis for distinguishing between qualified voters within the State."

The Georgia General Assembly has historically used geography to discriminate against urban voters. Previously the county unit system deprived the urban voter of any power in the elections and in the legislature. Reapportionment, under Court order, has eliminated this. In reapportioning the Senate, the old General Assembly again sought to minimize the strength of certain urban groups. Certain districts were predominantly composed of racial and political minorities. The only way to prevent the election of members of these groups to the Senate was to require something other than district elections in the urban areas. This gave birth to the county wide election method in the multi district counties and the representation of the county as a unit rather than the district.

Thus, Georgia has by statute created two classes of voters—one with representation and one without.

CONCLUSION

Appellees respectfully submit that they have demonstrated that the portion of the State statute attacked which requires county wide elections in multi district counties violates the equal protection clause of the Fourteenth Amendment. Appellant, on the other hand, has shown no valid reason why county wide voting is required under the statute and no valid reason why different categories of voters receive different treatment with regard to their vote for their State Senator. For

the foregoing reasons, the judgment of the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles A. Moye, Jr., one of the attorneys for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of November, 1964, I served a copy of the foregoing Brief for the Appellees on the Appellant by mailing a copy in a duly addressed envelope with postage prepaid to his Counsel of Record, The Honorable Eugene Cook, Attorney General of the State of Georgia, 132 Judicial Building, 40 Capitol Square, Atlanta, Georgia.

CHARLES A. MOYE, JR.
Of Counsel for Appellees